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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

POSTAL TELEGRAPH-CABLE CO., *Appellant.*	Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.
vs.	
CHICAGO GREAT WESTERN RAILROAD, *Appellee.*	

BRIEF AND ARGUMENT FOR APPELLANT.

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BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT.

ORIGIN OF THE CASE.

Three cases involving the legality of typical and similar contracts between telegraph companies and railroad companies for the interchange of their utilities service for other than a money consideration at published tariff rates, are before this court for review. They arise under the Interstate Commerce Act as amended, and rulings of the Interstate Commerce Commission under that act. Because of their similarity these cases have been set for hearing on the same date, and we believe, therefore, it is not out of place to discuss them collectively.

Two of these cases involve contracts of the Postal Telegraph Cable Company, and one case involves a contract of the Western Union Telegraph Company. The titles of these cases are: *Chicago and*

Great Western Railroad Company v. *Postal Telegraph-Cable Company; Postal Telegraph Cable Company* v. *Tonopah & Tidewater Railroad Company,* and *Baltimore & Ohio Railroad Company* v. *Western Union Telegraph Company.*

For brevity these three cases will herein be referred to as the Great Western case, the Tonopah case and the B. & O. case. We will also refer to the respective railroad companies by those designations, and to the Postal Telegraph-Cable Company as The Postal Company, and to the Western Union Telegraph Company as The Western Union Company.

The Great Western case comes from the United States District Court for the Northern District of Illinois, Eastern Division, through the Circuit Court of Appeals for the Seventh Circuit. The Tonopah case comes from the Municipal Court of the City of New York, through the Appellate Division of the Supreme Court of that State direct to this court; and the B. & O. case comes from the United States District Court for the Southern District of New York through the Circuit Court of Appeals for the Second Circuit.

NATURE OF CASES.

The Great Western case is a bill in equity brought to obtain a mandatory injunction to compel specific performance by the Postal Company of that portion of their contract stipulating for the joint use of certain operating facilities and providing for free telegraphic service to be rendered by the Postal Company to the Great Western Company, and also to enjoin the prosecution of certain suits commenced

by the Postal Company against the Great Western Company in the New York State Courts, where a recovery was sought for telegraphic services rendered. (Tr.—*Postal* v. *C. G. W.* 3.)

The Great Western case was heard upon bill, answer, replication and oral and documentary evidence, and a decree was entered therein dismissing the bill for want of equity. (Tr. 96, 245 Fed. 592.) From such decree the Great Western Company appealed to the Circuit Court of Appeals for the Seventh Circuit. The Circuit Court of Appeals reversed the decree of the District Court with instructions to grant the prayer of the bill. (Tr. 110, 249 Fed. 664.) The Postal Company brings the record to this court on further appeal.

The Tonopah case is a suit at law brought by the Postal Company to recover for telegraphic services rendered by the Postal Company to the Tonopah Company in which the Tonopah Company set up as a defense their operating agreement which provided for free telegraphic services to be rendered by the Postal Company to the Tonopah Company.

The B. & O. case was also a bill in chancery and was brought in the District Court of the United States for the Southern District of New York by the B. & O. against the Western Union Telegraph Co. to enforce the specific performance of a contract similar to the contracts in the Great Western and the Tonopah cases. There was a decree upon the prayer of the bill. (241 Fed. 162.) The Western Union Company removed the case by appeal to the Circuit Court of Appeals for the Second Circuit, where the decree was affirmed. (242 Fed. 914.) A

further appeal has brought that case to this court, where it is docketed as No. 26021 at the October term, 1917.

THE LEGAL QUESTION INVOLVED.

Briefly we will state the legal question this court is called upon to consider upon the record of these three cases and to which we shall later address our argument.

The legal question is whether or not an operating agreement between a telegraph company and a railroad company, which provides that the telegraph company shall furnish free commercial telegraphic service to the railroad company off the line of the railroad company, and that the railroad company shall furnish to the telegraph company free commercial transportation for men and material destined to places off the line of the railroad company or in transit on business other than that of their joint undertakings, without reference to the published tariff rates of the companies, is prohibited or permitted by the Interstate Commerce Act as amended in 1906 and 1910, which provides as follows:

> "All charges made for any services rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable as aforesaid, or in connection therewith shall be just and reasonable; and every unjust and unreasonable charge for said services or any part thereof is prohibited and declared to be unlawful; provided * * * that nothing in this act shall be construed to prevent telephone, tele-

graph and cable companies from entering into contracts with common carriers for the exchange of services."

The Interstate Commerce Commission has ruled that any exchange of off the line, public utility or commercial services, between such companies, must be made upon the basis of their published tariff rates, those rates to which the general public is entitled.

In order that the court may get the setting of this legal question we deem it advisable here to collect together the historical data out of which grows the record of these three cases.

HISTORICAL VIEW OF THE RELATIONSHIP OF RAILROADS AND TELEGRAPHS.

About the middle of the nineteenth century the use of the telegraph became largely identified with railroad operations. The rapid and accurate transmission of telegraphic orders for the purpose of train movement speeded the operation of trains carrying passengers and freight into the various business centers. The idea of linking together the various social and business centers of the country by binding together the various railroad telegraph systems for the convenient and rapid transmission of intelligence throughout the country was the basis of the type of contracts here in question. Through joint operation under working agreements, the lines of telegraph used by railroad companies were put into the service of a superimposed telegraph system which tied together the railroad telegraph lines into one commercial telegraph system. The opportunity

thus afforded to communicate readily from any newly established business center on any railroad line with other portions of the United States through such telegraph system became one of the governing factors in the development of our commercial life.

This practice of joint operation by railroads and telegraph companies, under contracts such as here in question, has been openly followed since the middle of the last century. The existence of these contracts and the operation under them is a matter of common knowledge. The contract in the B. & O. case was entered into on October 15, 1887; the one in the Great Western case was entered into on December 26, 1888; and the one in the Tonopah case on June 26, 1907. The question of the validity of such contracts is now raised as being inconsistent with the provisions of the Interstate Commerce Act passed by Congress under its constitutional power to regulate commerce.

NATURE AND PROVISIONS OF CONTRACTS.

These contracts are substantially the same. They contain many provisions which it is apparent and will be conceded were never intended to be disturbed by congressional legislation. These portions of contracts in question deal with the internal management and operation of these utilities as distinguished from the product or service furnished by the utility as common carriers for the convenience and use of the general public. In other words, no question is raised on any of these records as to the

right of telegraph companies and railroad companies to carry out contracts for exchange of telegraph service on a railroad itself for railroad transportation of telegraph men and material to be used on that railroad. The controversy here is over free telegraphing to and from points off the railroad and free railroad service for telegraph men and material not used on the railroad furnishing such free transportation.

Some of the provisions common to all these contracts generally speaking are, that a portion of the wires shall be for the exclusive use of the railroad company in handling its private telegraphic business, except that when these exclusive railroad wires are not in actual use the telegraph companies may use them for sending local messages to the various stations; that the telegraph companies shall furnish all the materials necessary to keep the lines in a state of repair and that the railroad companies shall furnish the labor necessary to make the repairs and transport the material and equipment to such place on the line, as it may be needed, without charge; that the telegraph operators in the employ of the railroad company at its various stations shall handle the business of the telegraph company transmitted to such stations. The Western Union contract in the B. & O. case provides for a joint superintendent of telegraph who shall be under the supervision of the telegraph company so far as its business is concerned and under the supervision of the railroad company so far as its telegraphic business is concerned, such superintendent to be paid jointly, etc. There are other provisions in the con-

tracts pertaining to the operation and control of the system established, but the ones just mentioned will serve to briefly illustrate the nature of the joint underaking.

Paragraphs three and seven of the contract between the Postal Company and the Great Western Company, which are called in question in this case, are as follows (Tr. 52 and 53, *Postal* v. *C. G. W. R. R.*):

> "III. The railway company agrees to transport free of charge over its railway, upon application of the superintendent or other officer of the telegraph company, employees of the telegraph company, when traveling upon the business of said company, and also to transport and distribute free of charge along the line of its railway all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of this agreement, and also of material and supplies for the establishment, maintenance and operation of the offices of both parties hereto at places along and adjacent to said railway."
>
> "VII. The telegraph company agrees to transmit free over its lines beyond said railway telegraph lines, business of the railway company to the extent of $10 per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular rates of the telegraph company, and for this purpose the telegraph company will issue to said officers of the railway company as may be designated by the president, vice-president or general manager thereof, annual franks of the telegraph company, authorizing such free transmission of

messages relating strictly to the railway or corporate business of the railway company, originating at or destined to points on the telegraph company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the railway company beyond its lines shall amount to more than $10 per mile of railway per annum, the excess shall be paid for at one-half the regular rates of the telegraph company. It is understood and agreed, however, that the telegraph service herein provided for, applies only to the transmission of messages concerning business of the railway company, and shall not be extended to messages for transmission by ocean cable, nor to messages ordering sleeping car, parlor car or steamer berths, or other accommodations for customers of the railway company, the tolls upon which should be properly chargeable to such customers."

Paragraphs ten and eleven of the contract between the Western Union and B. & O., which is called in question in their case, is as follows (Tr. 29, *W. U.* v. *B. & O.*):

"*Tenth.* The telegraph company shall receive and transmit over the said lines along said railroads, in the order in which they and other messages shall be filed with it, and shall deliver, with promptness and despatch, and free of charge, the messages of the officers and agents of the railroad company pertaining to its railroad business between all cities, towns and places now reached by said telegraph lines on said railroads.

And it is expressly agreed that such messages shall be received at and delivered from any of the offices of the telegraph company or its subordinate companies in any of the said cities, towns and places, and when so received shall be transmitted by the telegraph company over said

telegraph lines free of charge. And if the same for any reason of convenience to the telegraph company shall be transmitted by other lines to the place of destination, no charge shall be made therefor.

The telegraph company agrees to issue to such officers of the railroad company, as may be designated by the president or other authorized officer thereof, annual franks authorizing the free transmission messages relating strictly to the railroad business of the railroad company's railroads covered by this agreement, originating at and destined to points on the lines now or hereafter owned or operated by the telegraph company, or its subordinate companies, in the telegraph company's general telegraph system, beyond or off the line of said railroads to an amount not exceeding Ten Thousand Dollars ($10,000.00) per annum calculated at the regular commercial day rates of the telegraph company between the points at which such messages originate and the points to which they may be destined. And the railroad company agrees to pay to the telegraph company one-half of its aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for applies only to the transmission of messages concerning the operation and business of the railroad company's railroads covered by this agreement, and shall not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodations for customers of the railroad company, the tolls on which should properly be chargeable to such customers.

Eleventh. The railroad company agrees to transport, free of charge over its said railroads, on application of the superintendent or other proper officer of the telegraph company, all em-

ployees of the telegraph company when traveling on its business or engaged in its work along said railroads; and to likewise transport and distribute free of charge all poles and other material and supplies of the telegraph company for the construction, maintenance, renewal and reconstruction of the said telegraph lines named on Schedule B along said railroads, and of such additional wires as may be erected on said telegraph lines, and of the lines and wires hereinafter provided for, on extensions, branches and acquired roads, and also material and supplies for the establishment, maintenance and operation of the offices of both parties hereto upon said telegraph lines at places along said railroads.

And the railroad company also agrees to transport, free of charge, the employes of the telegraph company when traveling on its business, or engaged in its work, and the poles and other material and supplies of the telegraph company, required for the construction, maintenance, renewals and reconstruction of other telegraph lines of the telegraph company than those hereinbefore named whether on or off the line of said railroads, to an amount not exceeding Ten Thousand Dollars ($10,000.00) per annum, calculated at the current transportation rates of the railroad company; and the telegraph company agrees to pay to the railroad company one-half of its aforesaid rates on all such transportation of employees and poles and other material in excess of said amount. Settlement to be made yearly."

The contract between the Postal Company and the Tonopah Company was entered into after the passage of the Hepburn Amendment in 1906, and after the Interstate Commerce Commission had ruled that railroad companies could not issue free

transportation to telegraph company employees unless such employees were engaged in the repair, maintenance or supervision of the joint operating convenience of the contracting companies. The contract in the Tonopah case must, therefore, be read in the light of the Hepburn Amendment, and the interpretation placed thereon by the commission. The Tonopah contract gives the railroad free telegraphic off the line service, but binds the Postal Company to pay the published rates of the Tonopah Company for its off the line service. This arrangement resulted from the fact that at the date of the contract the Tonopah Company was subject to the commerce act restriction while the Postal Company was not.

Paragraphs nine, ten and eleven of the Postal-Tonopah contract are as follows (Tr. 17-20, *Postal v. Tonopah, Etc. R. R. Co.*).

> "*Ninth.* (1) All telegrams pertaining to the business of the railroad company between points on the lines of the railroad company shall be transmitted by the railroad company's own employees on its own telegraph lines.
>
> (2) The telegraph company agrees to issue cards or books of stamps to such officers and employees of the railroad company as may be designated by the proper officers of said company, authorizing the transmission of telegrams relative to the business of the railroad company over the lines of the telegraph company within the United States to an amount, calculated at the regular day rates of the telegraph company, not exceeding Twelve Dollars ($12) per annum for each and every mile of railroad up to two hundred (200) miles on which telegraph wires are operated under this

agreement; and not exceeding Ten Dollars ($10) per annum for each and every mile of railroad over two hundred (200) miles on which telegraph wires are operated under this agreement. The tolls on all such telegrams shall be computed at the regular day rates of the telegraph company between the points of origin and destination of such telegrams and the railroad company agrees to pay to the telegraph company the latter's regular commercial day rates on all such messages in excess of the amount of service above specified, settlement to be made annually.

(3) It is understood and agreed that the service herein provided for applies only to the transmission of messages concerning only the operation and business of the railroad company, and more over, shall not in any case be extended to messages for transmission by ocean cables or by other telegraph companies.

(4) Cards or stamps issued by the telegraph company authorizing the transmission of telegrams, when presented at commercial telegraph offices of the railroad company, shall be honored and telegrams offered thereunder shall be accepted and transmitted to and from said offices, and no charge therefore shall be made by the railroad company against the telegraph company.

(5) The railroad company and its employees shall not, without the consent of the telegraph company, transmit any messages between points on the railroad company's lines and points on the telegraph company's lines except those provided for in this agreement.

Tenth. (1) The railroad company agrees to issue to such officers and employees of the telegraph company as may be designated by the executive officers of the telegraph company annual and trip passes or tickets authorizing the free transportation over the lines of the

railroad company of said officers, employees and laborers of the telegraph company when traveling on business in conection with the construction, maintenance or operation of the telegraph line and service upon the railroad company's own right of way herein specified and provided for; and further agrees to transport over its lines free of charge to the telegraph company all such material and supplies as are required in connection with the construction, maintenance or operation of the telegraph lines and service upon the railroad company's own right of way herein specified and provided for.

(2) Said transportation (to be furnished without compensation to the railroad company other than the benefits to the railroad company of this contract) shall not exceed in any year the amount of telegraph service that the telegraph company herein agrees to perform for the railroad company and the telegraph company hereby agrees to pay to the railroad company its regular current transportation rates for such transportation in excess of said amount, settlements to be made annually.

(3) It is understood and agreed that said transportation shall be furnished by the railroad company and availed of by the telegraph company in accordance with the Interstate Commerce Act of the Federal Congress.

Eleventh. The railroad company further agrees to transport to and from regular stations over the whole or any part of its railroad all officials, employees, laborers, material or supplies of the telegraph company, as desired by the telegraph company, in connection with the construction, maintenance or operation of the telegraph company's lines and service off the line of the railroad company and the telegraph company agrees to pay in cash to the railroad company the railroad company's regular tariff rates now or hereafter established for all such

transportation of men and material; and the railroad company shall pay to the telegraph company for telegraph service actually rendered hereunder at full rates up to the amount of cash paid by the telegraph company to the railroad company for the transportation of officials, employees, laborers, materials or supplies of the telegraph company, traveling or shipped in connection with the construction, maintenance or operation of the telegraph company's lines and service off the line of the railroad company the telegraph service so paid for being considered a part of the service (at $12.00 or $10.00 per mile per annum as aforesaid), to which the railroad company is entitled as hereinabove specified in paragraph ninth."

HISTORIC VIEW OF COMMERCE REGULATION.

The regulation of Interstate Commerce by Congress of the United States was not undertaken generally until the year 1887 when the Interstate Commerce Act was passed. It has been stated that among the causes which induced Congress to legislate upon the subject of Interstate Commerce was the fact that railroads had become the principal modern instrumentality of commerce, and that as such they were natural monopolies and their operation accompanied by the usual evils of monopolies. The arbitrary service of the railroads brought loud complaints from the public. It was to cure these evils and to protect commerce that Congress passed the act which was entitled "An Act to Regulate Commerce," which had for its purpose the regulation of rates, the abolition of rebates, and the prevention of discrimination between communities and

persons. Telegraph companies were not mentioned in the Act of 1887. It has been also stated:

> "It may be affirmed with entire confidence that the act was not passed to protect railroad corporations against the misconduct or mistakes of their officers or even primarily to protect such corporations against each other. The Act does indeed require them to afford reasonable, proper and equal facilities for the interchange of traffic between their respective lines; but even this requirement was for the public benefit more particularly than for the benefit of the carriers." (Moore on Interstate Commerce, 36.)

In 1906 the so-called Hepburn Amendment was passed. The amendment enlarged upon the original Act and brought other public utilities under interstate regulation, and was particularly aimed at the prevention of the vice of free transportation and indiscriminate issuance of passes by the railroads. The 1906 amendment did not include telegraph companies.

There was in the amendment of 1906 a provision which has some bearing upon the question here at issue. In that amendment there is an exception to the restriction upon the issuance of passes, in this that "*Linemen of telegraph and telephone companies*" are specifically excepted from its provisions.

No judicial interpretation or administrative ruling affecting the relationship between telegraph companies and railroad companies was had until after the passage of the Hepburn Amendment in 1906.

THE HEPBURN AMENDMENT AND RULINGS AND DECISIONS UNDER IT.

The provisions of the Hepburn Amendment of 1906, restricting the use of passes is as follows:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

This provision of the Hepburn Amendment has received administrative rulings from the Interstate Commerce Commission and judicial interpretation by the several courts of the United States including this court.

It was ruled by the commission in September, 1906 (Appendix 45, I. C. C. 57) that only money might be received in payment for transportation subject to the Commerce Act whether of passengers, or property or for any service in connection therewith. (Conference Ruling No. 207.) (Approved 219 U. S. 486.)

In October, 1906, the commission ruled (Appendix 45, I. C. C. 57) that the Hepburn Amendment did not prevent a carrier from giving free or reduced car-

riage over its own line to contractors for material, supplies and men for use in construction, improvement or renewal work on the line of the carrier, provided such arrangements for free or reduced carriage were made a part of the specifications upon which the contract was based and of the contract itself. (Administrative Ruling No. 208.) (Approved 228 U. S. 177.)

Following rulings No. 207 and No. 208 the Western Union and the Postal Telegraph Companies joined in a petition to the commission for a modification of rulings of the commission so far as they might control or govern certain contracts theretofore entered into between the petitioning companies and certain railroad companies under which, in consideration of free telegraphic service given by the telegraph companies over wires off the lines of the respective contracting railroad companies, the railroad companies agree to furnish free or reduced transportation to such telegraph companies for the men, materials and supplies necessary in connection with the construction, operation and maintenance of such telegraph lines off the lines of the respective contracting carriers and upon the rights of way of other carriers, and in December, 1906, the commission expressed their opinion as follows (Tr. 19, *Postal* v. *C. G. W. R. R.*):

> "The commission is of the opinion that such contracts with telegraph companies may lawfully be entered into by a railroad or by a group of separately incorporated roads generally recognized as a 'railway system'; and that in consideration of the construction, maintenance and operation of a telegraph line upon the right

of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced-rate transportation for such officers, men, materials and supplies of such telegraph company as are required and necessary in connection with the construction, maintenance, and operation of such telegraph lines upon such carriers own right of way or the right of way of such system of roads. But the commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in conection with the construction, maintenance, and operation of a telegraph line and service off the lines of such carrier and on the lines or system of lines of any other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines."

On June 3, 1907, the Interstate Commerce Commission announced its administrative ruling No. 219, as follows (Tr. 20, *Postal* v. *C. G. W. R. R.*):

"TRANSPORTATION OF MEN OR PROPERTY FOR TELEGRAPH COMPANIES.—In its decision on the petition of the Western Union and Postal Tele-

graph Companies, issued December 27, 1906, the commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a 'railway system,' may be considered as one in the making of contracts for telegraph service on that system.

This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of D. H. franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operation of any of the lines of railway which such officials represent, nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as a part of the operating facilities of such railways. Practically all telegraphing so done is 'off the line' business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has a contract for telegraphic service."

On June 30, 1908, the Interstate Commerce Commission promulgated a further rule concerning the

issuance of passes as follows (Tr. 21, *Postal* v. *C. G. W. R. R.*):

> "NOTICE AS TO THE ISSUANCE OF PASSES.—It appearing that the ruling issued by the commission on the 9th day of June, A. D. 1908, relative to the issuance and use of passes, should be modified in certain respects relating to the forms of passes to persons eligible to receive free transportation under act to regulate commerce, it is ordered that said ruling shall be amended to read as follows:
>
> Many abuses in the issuance and uses of passes have ben discovered by the commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the commission at this time makes announcement that it will recommend the indictment and prosecution of all carriers and persons issuing passes to, or allowing the use of passes by, any persons not included within the designated classes to whom free tranportation may be given by carriers subject to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:
>
> 1. Officers or employees of news companies other than newsboys.
>
> 2. Officers or employees of telegraph or telephone companies, excepting when personally engaged in operation, extension, repair or inspection of lines upon or along the railroad right of way and used in connection with the operation of the railroad. * * * *"

In November, 1907, the Interstate Commerce Commission called upon all railroads to file with the commission copies of all contracts for telegraph or telephone service on their line.

(Tr. 32—*Postal* v. *C. G. W. R. R.*)

In its twenty-first annual report to Congress made in December, 1907, and again in its twenty-second annual report to Congress in December, 1908, the Interstate Commerce Commission reported its decisions and rulings upon the telegraph contracts between railroad and telegraph companies and the interpretation which it had placed upon the Hepburn amendment.

(Tr. 34—*Postal* v. *C. G. W. R. R.*)

In July, 1908, the United States Circuit Court for the Northern District of Illinois, in the case of *United States* v. *C. I. & L. Ry. Co.*, 163 Fed. 114, involving a contract between the Railway Company and Munsey's Magazine for the exchange of passes for advertising, held, that only money might lawfully be received in payment for transportation. This case was subsequently affirmed by the Supreme Court, 219 U. S. 486.

In 1911 the U. S. Supreme Court decided the case of *L. & N. R'd Co.* v. *Mottley*, 219 U. S. 467, in which it was held that a contract entered into in 1871 giving an annual pass for life to the Mottleys in consideration of a release of damages for an accident was in violation of the Interstate Commerce Act as soon as that act came into existence and that the consideration for the passes was a different consideration from that required of the public in the published tariffs of the company. This case arose prior to the passage of the 1910 amendment.

There was one judicial *nisi prius* determination upon the validity of that portion of the contract between the Postal Company and the Great Western

Company which provides for the granting of free transportation to linemen of the Postal. The question was raised between the Postal Company and the Receiver for the then Chicago Great Western Company, the predecessor of the present Chicago Great Western Company. The matter was adjudicated in the receivership proceeding entitled *John A. Humbird, et al.*, v. *Chicago Great Western Railway Company*, No. 28934 in the Circuit Court of the United States, and the decree was entered therein upon the intervening petition of the Postal Telegraph-Cable Company. (Defts. Ex. 2—Tr. 43—*Postal* v. *C. G. W. R. R.*)

In the Humbird case it appeared that in February, 1909, there was a great sleet storm in the territory east of the City of Chicago, which broke down a portion of the Postal Company's wires and poles, and linemen from other portions of the country were drafted and brought to the scene of destruction to repair the lines. Four of the telegraph linemen were brought by the Postal Company from the City of St. Paul, and after the lines had been repaired application was made by the Postal Company for return transportation from Chicago to St. Paul over the Great Western. Failing to get transportation promptly and to save delay, the railroad fare was paid over the Great Western Railroad, and thereafter the intervening petition above referred to was filed for the purpose of obtaining a refund of the money paid out for the return railroad fares, upon the ground that the Postal Company was entitled to have free transportation for such linemen under their contract. The linemen had been brought to

Chicago and were returning to St. Paul upon business which arose off the line of the Great Western and had no connection with the operating service of the Great Western Railroad.

Upon the hearing before Judge Kohlsaat, then sitting in the Circuit Court, the prayer of the petition was denied, and the effect of the decision was to hold the contract for free transportation invalid under the Hepburn Amendment of 1906. The decision was acquiesced in by the Postal Company. (Tr. 71—*Postal* v. *C. G. W. R. R.*)

The record in the Tonopah case discloses the fact that there was a suit brought by the Western Union Telegraph Company against the Baltimore & Ohio Railroad Company in 1908, in the United States Circuit Court for the District of Maryland, to compel the specific performance of the identical contract in the present B. & O. case. The record discloses that the Baltimore & Ohio Company in compliance with the administrative ruling of the Interstate Commerce Commission under the Hepburn Amendment, refused to perform that part of the contract which required the B. & O. to furnish interstate transportation for employees and material in course of transit off the line of the Baltimore & Ohio Road. Before the case in the Maryland Court was tried Congress passed the amendment to the Interstate Commerce Act of 1910. Thereafter the Western Union withdrew its suit, and the bill in the Baltimore & Ohio case alleges that the parties to that suit adjusted their differences and thereafter operated under the contract as they had operated prior to the Hepburn Amendment of 1906, and continued

to so operate until the administrative ruling of March 28, 1916, was rendered by the Interstate Commerce Commission. (Tr. 89—*Postal* v. *Tonopah, etc. R. R.*)

In the record of the Great Western case it also appears that after the 1910 amendment the Postal Company and the Great Western Company likewise exchanged services in compliance with their contract as they had done prior to the Hepburn Amendment of 1906. (Tr. 80—*Postal* v. *C. G. W. R. R.*)

THE 1910 AMENDMENT AND RULINGS UNDER IT.

On June 18, 1910, Section 1 of the Commerce Act was amended to read as follows: (The additions of 1910 are printed in italics.)

> "Section 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water, *and to telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District of the United States, to any other State, Territory or District of the United States, or to any foreign country,* who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad. * * *
>
> All charges made for any service rendered or to be rendered in the transportation of passengers or property *and for the transmission of messages by telegraph, telephone, or cable,* as

aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; *provided, that messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages; and provided further, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services.*

* * *

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors, and immigration inspec-

tors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons; provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence or other clamitous visitation; *and provided further, that this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act; provided further, that the term 'employees' as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term 'families' as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier.* * *"

On March 31, 1911, Conference Ruling No. 305 was promulgated by the Commission (Tr. 32—*Postal v. C. G. W. R. R.*):

"305. APPLICATION OF THE AMENDED ACT TO TELEGRAPH AND TELEPHONE COMPANIES.—(*a*) Each and every telegraph and telephone company

which transmits messages over its line or lines from a point in one state, territory, or district of the United States to any other state, territory, or district of the United States, or to any foreign country, is subject to the provisions of the Act. * * *

(*d*) It follows that telegraph and telephone companies subject to the Act, as above indicated, must conform to the provisions of Section 1 thereof, requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just, and that such companies may lawfully issue franks covering free interstate service or may grant free interstate service to the same extent, and subject to the same limitations as other common carriers under the provisions of said section. * * *

(*e*) Such telegraph and telephone companies subject to the Act are also governed by the provisions of Section 3 forbidding any undue or unreasonable preference or advantage of rebates or otherwise, or any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and are subject to the lawful orders of the Commission made pursuant to the provisions of Secton 15 of the Act, and also of Section 20 thereof respecting the keeping of accounts and memoranda and the making of reports to the Commission."

On June 8, 1912, the Interstate Commerce Commission approved Conference Ruling No. 364, as follows (Tr. 32—*Postal* v. *C. G. W. R. R.*):

"EXCHANGE OF SERVICES BY TELEPGRAPH AND RAILROAD COMPANIES.—Under the amendatory act of June 18, 1910, it is provided, 'That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.' Upon inquiry,

Held, That a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement."

On March 23, 1916, the Interstate Commerce Commission re-affirmed its prior conference rulings and promulgated Conference Ruling No. 491 (involved in these three appeals) which reads as follows (Tr. 37—*Postal* v. *C. G. W. R. R.*):

"EXCHANGE OF SERVICES UNDER CONTRACTS BETWEEN RAILROADS AND TELEGRAPH, TELEPHONE, OR CABLE COMPANIES.—Upon inquiry whether under Section 1 of the Act a railroad may contract with a telegraph company to transport the latter's property, either for use on the railroad's line or elsewhere, at a rate different to the regularly published rate for such transportation, *Held,* That such an exchange of services may lawfully be made only upon the basis of the legally estabilshed rates of the railroad and on the basis of the fixed charges of telegraph company regularly exacted of other customers for similar services; except that such carriers may so contract, without reference to said lawful rates and charges, for the transportation of the property of the telegraph company over the line of the contracting railroad company for use along the latter's line and in the construction, improvement, or operation thereof; that is to say, when such transportation is not conducted by said railroad as a common carrier."

THE VARIOUS ATTITUDES TAKEN BY THE INTERESTED PARTIES AND THE COMMISSION.

The respective positions taken by the parties affected by and interested in the enforcement of the commerce act are as follows:

After the passage of the Hepburn Act in 1906, the Interstate Commerce Commission took the position that the Hepburn Amendment precluded the giving of transportation by railroad companies to the men and material of the telegraph companies, except upon the basis of the published tariff rates of the companies, and ruled accordingly. (Telegraph companies were not then subject to the Act.) The exception in the Hepburn Act permitting free transportation to linemen of telegraph companies was so construed as to apply only to linemen employed along the line of the railroad furnishing such free transportation.

The Postal Company acquiesced in the ruling of the Commission and entered into its Tonopah contract upon the basis of the ruling of the Commission.

The Western Union filed its bill in the United States Circuit Court in Maryland to enforce its contract with the B. & O. Railway, on the theory, we presume, that the Mottley case was in the United States Supreme Court and would decide the question.

After the passage of the Amendment of 1910, the railroads in dealing with both the Postal Company and the Western Union Company went back to the letter of their contracts and treated them as they

had prior to the 1906 Amendment, on the theory that the proviso had enlarged the scope of the Act.

After the 1910 Amendment the Commission ruled (March 23, 1916, being the ruling involved in these three appeals) that neither railroads or telegraph companies could give or exchange their utility services upon any other basis than that of their published public tariff rates, adhering to their ruling under the 1906 Amendment and bringing the telegraph companies under the same ruling by virtue of the 1910 amendment.

After the ruling of the Commission of March 23, 1916, the Postal Company acquiesced in the ruling and sought to collect for its utility services. This time the B. & O. filed the bill against the Western Union to enforce the contract and so far they have had a very pleasant and satisfactory litigation. The B. & O. has cleverly alleged and the Western Union eagerly admitted. Their record bears evidence of very careful arrangement.

In fact the Circuit Court of Appeals in that case pointed this out when it said (242 Fed. 915):

> "The real contest in this case is between the plaintiff and defendant on one side and the Interstate Commerce Commission on the other."

In the Great Western case and in the B. & O. case the Interstate Commerce Commission appeared by their counsel as *amicus curiae* and presented their views to the Trial and Appellate Courts.

The B. & O. case seems not to have been fully presented to the Circuit Court of Appeals inasmuch as in its opinion, the court says:

> "At stated periods the amount of 'off line'

> **business transacted by each for the other is ascertained and balances discharged (as in a clearing house) at a rate of settlement or exchange fixed at one-half the ordinary rates of each party to the agreement. The right to do this is the only question in this case."**

That would be true if both the telegraph company and railroad company each used more than $10,000 of railroad and telegraph service. Even then it would be objectionable because it would be a half rate for the excess paid for by one to the other. There is a more serious objection, namely, that in the actual operation of these railroad-telegraph contracts the fixed, specified amount of the service is often not used up by one or both of the parties and then absolutely free service results. For illustration, the record in the Great Western case now at bar shows that the Postal Company received from the railroad company in 1915 railroad service to the amount of $3,680.40 while the railroad company received from the telegraph company telegraph service to the amount of $9,100.04. The difference was not paid for at all, either at half rates or any other rate. It was free service pure and simple. The record in the Baltimore & Ohio case now at bar does not show how much telegraph service the railroad used nor how much railroad service the telegraph company used, and the above quotation from the opinion of the Circuit Court of Appeals shows that that court did not fully understand the exact situation. To illustrate further, if under that contract the Western Union used $7,000 of railroad service and the railroad used $17,000 of telegraph service, the railroad company paid half rates for $7,000 of

telegraph business and nothing at all for $10,000 of telegraph service, excepting so far as that $10,000 is offset by $7,000 of railroad service furnished to the telegraph company. On the other hand, if the telegraph company received $7,000 of railroad service and the railroad company received $9,000 telegraph service, there was $2,000 of free service to the railroad. If the record in the Baltimore & Ohio case now at bar had stated fully, the same as the record in our Chicago Great Western case states fully, the exact amount of service rendered by each company, the Circuit Court of Appeals would have had the facts and situation fully before it.

That Baltimore & Ohio contract seems to have been selected (the same as several years ago) as the most favorable contract to upset the ruling of the Interstate Commerce Commission.

The Circuit Court of Appeals said:

> "If it were shown that this contract or any other agreement, were being used as a cover for injuring one party or the public, other rules would apply. Nothing of the kind being suggested, the decree is affirmed."

No suggestion was made to that court by either party that this so-called exchange of free service was contrary to public interest.

The record in the Baltimore & Ohio case does not fairly present the questions, as is apparent from the following quotations from the bill *which are admitted by the answer*:

> "That upon said system of telegraph lines defendant has nearly 25,000 offices, about 20,000 of said offices being railroad offices yielding rev-

> enues too small to pay for maintenance, separate and apart from the advantages derived from contracts with railroad companies as hereinafter referred to, and which, but for such contracts, could not be maintained as independent telegraph offices, and would not, therefore, afford telegraphic facilities to the public." (Tr. *W. U.* v. *B. & O.* 17.)

The record in the Postal-Chicago Great Western case shows that the railroads could and would maintain telegraph service at its depots without a telegraph contract and that, in fact, the Pennsylvania Railroad, the Chicago, Milwaukee & St. Paul and the Canadian Pacific, actually do transact a commercial telegraph business on their own account at their depots. (Tr. *Postal* v. *C. G. W. R. R.* 76.)

The following is another quotation, namely, that these railroad-telegraph contracts

> "have enabled the telegraph companies not only to offer commercial service in districts and at thousands of points where otherwise it would have been impossible except at prohibitive rates." (Tr.—*W. U.* v. *B. & O.* 17.)

Here, too, experience has shown that this is not true. That bill in equity further alleges that if this telegraph service was not furnished to the railroads the latter

> "would be compelled, as operating necessities, to construct and maintain for themselves, not only telegraph lines along their respective rights of way, but also telegraph lines between their principal termini, junction points and other important stations and commercial centers throughout the United States not directly served by such railroads." (Tr.—*W. U.* v. *B. & O.* 19.)

That proposition is absurd on its face, because a railroad can pay regular rates to a telegraph company for service to different parts of the United States, the same as a manufacturing company or an individual pays them.

Then there is an allegation in that bill of complaint,

> "that for the reasons aforesaid the destruction of such contracts would seriously injure the public service of the telegraph companies, not only as to the efficiency of such service, but also as to the rates at which it could be furnished." (Tr.—*W. U.* v. *B. & O.* 21.)

That is not a correct statement. The telegraph service given by the Pennsylvania Railroad today at its railroad stations on its own account and by the Chicago, Milwaukee & St. Paul and by the Canadian Pacific, does not injure the efficiency of public service of the telegraph company.

Then there is another allegation that the upholding of this ruling

> "would produce chaos in the business and operations of your orator's said railroad system and would disrupt and disorganize the same, and would prevent the efficient, safe and proper operation of its trains and the proper discharge of its duty to the public." (Tr.—*W. U.* v. *B. & O.* 23.)

We fail to see how the Baltimore & Ohio Railroad System would be in chaos if it had to pay for its telegrams to different parts of the country on its railroad business, the same as other corporations and individuals pay.

Such are the allegations admitted by the answer

in this suit of the Baltimore & Ohio Railroad Company against the Western Union Telegraph Company.

These and other equally unwarranted allegations sustained only by admissions in the answer of defendant are responsible largely for the result in that case. And the Court of Appeals for the Seventh Circuit merely followed, in the Postal case, the decision in the B. & O. case. So that little weight attaches to the decisions of the lower courts, especially in view of the careful presentation of the issues in the records of the Great Western and Tonopah R. R. cases and particularly the former.

THEORIES ON WHICH IT IS PROPOSED TO SUSTAIN THE RULINGS OF THE COMMISSION.

The Postal Company maintains that the holding of the Interstate Commerce Commission is right upon the following theories:

1, That the original Commerce Act and all of its amendments were designed to protect the public against unjust and discriminative rates and against all preference and privilege, and the Act should be construed liberally for the protection of the public.

That constructions of a statute should be adopted which in the light of the history of legislation best comports with the genius of our institutions, and therefore most likely to have been the construction intended by the law making power.

Texas & Pac. Ry. v. *Interstate C. C.*, 162 U. S. 218.

2. The Act of 1906 specifically excepted as to passes linemen of telegraph companies, thereby limiting the working agreements then existing between railroad companies and telegraph companies; and the ruling of the Interstate Commerce Commission that transportation of men and material for joint operating services was *permissible*, and transportation of men and material for telegraph companies under such circumstances as to amount to giving its utility services as a public carrier for other consideration than provided for in its published tariffs, was *prohibited*, was in accordance with the spirit of the Act.

When a statute is substantially re-enacted after its provisions have received judicial interpretation, it is regarded as having been adopted with knowledge of such construction and with the intention that it should thereafter be interpreted in the same way.

The "Abbotsford," 98 U. S. 440.

3. The Amendment of 1910 was passed in view of the construction already placed upon the Act, by the Interstate Commerce Commission and the courts, and should be so interpreted.

Interstate C. C. v. *B. & O. Rd.*, 145 U. S. 284.
McDonald v. *Hovey*, 110 U. S. 619.

A proviso in a statute where the enacting clause is general in its terms and objects, is to be construed strictly. The proviso carves special exceptions out of the enacting clause, and those who set up any special exception must establish it as being within the words as well as within the reason thereof.

U. S. v. *Dickson*, 15 Pet. (40 U. S.) 141, 165.

4. By the phrase "exchange of services" between telegraph companies and carriers, as used in the Act, was meant operating services as distinguished from utility or commercial services, and it was put in the Act with a view of not disturbing the joint convenience enjoyed by such companies. The phrase as used means "working agreements," between the parties.

The practical construction placed upon the statute by an administrative body charged with its enforcement is entitled to great respect and accepted unless there are cogent and persuasive reasons for departing from it.

U. S. v. *Moore*, 95 U. S. 760, 763.
Hastings, etc., Rd. Co. v. *Whitney*, 132 U. S. 357, 366.
Heath v. *Wallace*, 138 U. S. 573, 582.

5. The spirit of the Act in requiring utility or commercial services to be paid for in money places the burden of sustaining each utility upon the shoulders of its own patrons; otherwise, as the record discloses, patrons of the Postal Company must bear the operating expense of transmitting seven or eight thousand dollars' worth of telegrams per year for railroad telegraphing to the relief in the same amount to the patrons of the Great Western Company.

Public carriers of interstate commerce have no inherent right to privately contract for the sale or exchange of the commodity, utility or commercial service rendered the general public, as against the constitutional power of Congress to regulate inter-

state commerce. Any contract ante-dating the enactment of the Interstate Commerce Act or its amendments so providing, is abrogated and annulled by that Act so far as such contract contravenes the spirit of the Act.

L. & N. R. Co. v. *Mottley*, 219 U. S. 467.

6. The context of the contracts when examined will show there is no "exchange" of utility services within the meaning of that word. There is a sale of so much utility service (without regard to published rates) or the gift of so much utility service, or free telegraphing or free transportation (figured at public rates). The contracts require a record to be kept of the amounts,—so much per mile or per year. The amounts are computable.

A public utility doing an interstate commerce business may not be made a favored patron by another such utility and given lower rates and preferred service over its other patrons.

Int. Com. Comm. v. *B. & O. R. R.*, 225 U. S. 326.

7. Congress did not intend to disturb, but on the contrary to preserve the solidarity existing between railroad companies and telegraph companies, so far as joint operating facilities was concerned.

It is not the relationship of one public utility to another which was intended to be regulated by the Interstate Commerce Act, but it is the relationship of carriers to their patrons who are entitled to equality of charges. The term "exchange of services" contained in the proviso should be interpreted in view of this rule.

Penn. R. Co. v. *I. C. M. Co.*, 173 Fed. 1.

8. The exception made in the Act to telegraph and railroad contracts extends no further than the reason for it and cannot be read so as to permit practices against the spirit of the Act, where there is an interpretation open and patent which maintains the spirit of the Act and at the same time preserves the joint operating rights of the parties.

It is not within the province of the carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured.

Int. Com. Comm. v. *D. L. & W. R. R. Co.*, 220 U. S. 235, 251.

9. An arrangement for free or reduced carriage for necessary materials and men used in connection with construction or improvement of a railroad, entered into in good faith and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from published tariffs for the reason that such an agreement lies outside the policy of those provisions.

Sante Fe Ry. Co. v. *Grant Bros.*, 228 U. S. 177.

10. The rulings of the Commission upon the practical application of the Act are entitled to weight, where there is some doubt in the wording of the law.

The more the records in these cases are studied the more one is impressed with the need of commerce regulation. All of the selfishness of a privately owned public enterprise seems to pervade the records, and without real reason or logic. It is no longer necessary that public utilities, which are now engaged in interstate commerce and which

are protected by the Interstate Commerce Act, should drive hard bargains for commercial service with other similar utilities. Their dividends and their investments are protected by the application of just rates and practices established or maintained by the Interstate Commerce Commission.

But the fight on the Interstate Commerce Act by entrenched privilege and favortism has filled the books with a multitude of cases which make a sordid story of opposition to public justice. It is refreshing, however, to note the continued progressive action of Congress and the steady hand with which this wholesome legislation has been upheld by administrative officers and courts of justice.

And it seems so long as two possible constructions have been open upon any phase of the Act in question, selfishness has clung to the last spar and grasped at the last straw.

The Interstate Commerce Act was passed in 1887, and was aimed against rebates and unjust discriminations and provided penalties against carriers, but not against shippers. Two years later the Act was amended so as to provide penalties against shippers also. Shippers having refused to testify before the Interstate Commerce Commission, Congress passed and amendatory act in 1893 protecting witnesses from prosecution on account of any matter about which they should be required to testify. In 1903 the scope of the Act was extended authorizing injunctions, and prescribing increased penalties for departures from public tariff rates. A series of exposures and investigations disclosed the most ex-

tensive and flagrant discriminations and rebates. Congress then passed the Hepburn Bill which was approved June 29, 1906. The power of the Interstate Commerce Commission was increased and that body given authority to prescribe future just and reasonable rates and regulations, whenever the present rates are found unjust and unreasonable. It brought other interstate business enterprises under its jurisdiction, including pipe lines, sleeping cars, and express companies. The Act contained the so-called Commodity Clause forbidding railroads to carry any commodity other than timber and its manufactures in which the roads had a financial interest, except only so much as might be intended and necessary for their own use. This feature of the Act was aimed at railroads which owned and operated coal mines and oil fields, and the discriminations which had been practiced by them under cover of such ownership.

In June, 1910, the Act was further amended empowering the Commission to suspend the operation of tariffs, providing increased rates subject to investigation to determine their reasonableness and propriety. This provision was for the prevention of transportation wrongs before they should be committed. Jurisdiction and authority over telegraph and telephone lines was conferred upon the Commission, and the Commission empowered to make suitable orders in the same manner as if formal complaint had been made by shippers.

Congress also has passed many other Acts akin to the Interstate Commerce Act, which includes legislation to promote the safety of employees and trav-

elers upon interstate railroads by compelling safety appliances; requiring interstate carriers to report all accidents upon their lines; providing for the arbitration of disputes between employers and employees; compelling and regulating the inspection of boilers; limiting the hours of service of employees of interstate railroads and preventing cruelty to animals while in transit.

The attitude of Congress toward interstate commerce has been a progressive one, and at no time since the passage of the original act regulating interstate commerce has Congress taken a backward step.

The interpretation sought to be placed upon the proviso in the 1910 Amendment in the cases at bar by the defendant railroad companies is one which ascribes to Congress a desire to depart from the provisions of the Act of 1906 and from the interpretations placed thereon by the administrative body charged with the enforcement of the law and the interpretations of that law by the courts. The position of the defendant railroad companies is that the proviso in the 1910 Amendment, permitting railroad companies and telegraph companies to enter into contracts for the exchange of services, puts those companies out of the operation of that law so far as their inter-relations are concerned.

The question to be decided in these cases is whether Congress took a step forward or a retrogressive action when it brought telegraph companies under the Act to Regulate Commerce, and inserted the proviso in question.

Early in the history of railroading the telegraph became an operating convenience and necessity. The scheme of tying the various railroad telegraph systems together and superimposing thereon a commercial telegraph system was put in effect by the type of contracts shown in these records.

There is a real economy in the practice of joint operation of the railroad and commercial telegraph. All of the business centers are located on railroads and their rights of way form natural highways for the stringing of telegraph wire from city to city. Their routes are the most direct. Both railroads and telegraphs must use poles and similar accessories. Co-operation of the two systems, so far as joint use and operation is concerned, is a natural economy.

The joint conveniences of these two utilities should not be disturbed. They should be enjoyed—enjoyed for their mutual help—not for enrichment of one at the expense of the other.

Such mutual profit as is obtained by such joint operation should be for the benefit of all patrons and not at the expense of one set of patrons and the profit of the other.

In 1906 the Hepburn Amendment was passed, aimed particularly at the vice of free transportation of persons and materials. Under this act linemen were excepted from the restrictions as to passes. This exception, as construed by the Interstate Commerce Commission, affirmed by the Circuit Court of the United States (see page 20, *supra*) was confined strictly to linemen while engaged in telegraph work

on that particular railroad and not when en route to some other telegraph line. In the latter case it was held to be commercial railroad business for which a money consideration was to be paid.

The telegraph companies were not then under the act and their part of the contract, so far as their right to give away their commercial services was concerned, was outside of the act.

The railroads and telegraphs lived under this ruling until 1910, when the act was amended so as to include telegraph companies within its operation.

Had Congress in the 1910 Amendment merely placed the telegraph companies under the Act and said nothing about railroad-telegraph contracts, no one would doubt but that the ruling of the commission would be held to apply to telegraphs as well as to railroads and that telegraph companies must charge their public rates to the railroads for their commercial business regardless of their private contracts for free service with railroad companies, the same as has been upheld by the court as to railroads. (*Mottley Case*, 219 U. S. 467.)

But Congress used some language for the protection of both telegraphs and railroads in their amendment by way of a proviso which has been seized upon by selfish suggestion and "used as a handle," as Blackstone says, to preserve the ancient vice of service without price. After a generation of fighting against privilege and preference the railroads in the cases at bar claim that Congress deliberately took a step backward and deserted its steadily blazed pathway of progress; their contention is that Congress

has said by the proviso that railroads may pass and transport free any lineman or material of a telegraph company regardless of destination or origin, and telegraph companies may continue to transmit commercial messages free or at reduced rates in such quantities as are filed for transmission by railroad companies; and this regardless of the prior provision which says that their charges shall be just and reasonable and the same for all.

It must be presumed that Congress knew the interpretation placed upon the Act by the Interstate Commerce Commission, as that commission had made two reports advising Congress of the rulings made upon these very railroad-telegraph contracts here in question. So Congress knew when it passed the 1910 amendment that the commission had held that telegraph companies should have free transportation only so far as used on the line of the particular railroad, and that the ruling of the commission was that when the reason of that rule should fall free transportation should fall with it. And Congress knew that if the provisions as to passes and free service remained unchanged except as to a limited exchange of service the abuses of free service as defined by the ruling of the commission would cease to apply to the telegraph companies as it had to the railroads. When the telegraphs were brought under the act their telegraph business for the railroads, other than the telegrams between two points on the railroad, were brought back to a money basis, the same as railroad and express business, because every act of Congress on the subject from the beginning in 1887, and every decision of this court

has been to that effect, and, indeed, it is difficult to see how the railroad companies can get away from the decisions of this court as to collecting cash from the telegraph companies for all railroad service, except for the transportation of telegraph men and material for use on the railroad itself, and hence if such be the law as to the railroads the amendment of 1910 should be construed as establishing the same law for the telegraph companies.

The principle and policy of the act is that no utility subject to the act may prefer any one over others of the public. If railroads may not give transportation free, then telegraphs may not give telegraphic service free. No particular sacredness attaches to the business of railroading or telegraphing that would entitle them to be preferred over the public.

One of the fallacies in the position of the railroads in this matter is that they construe the Interstate Commerce Act to have been passed in their favor, for their protection, and urge that as a basis of interpretation of the proviso in question. Their position is wrong. The proviso was not intended to protect favoritism and privilege as against the public, but to protect only those rights in their contracts which stipulate for the conveniences of joint operating services. These operating services would in some instances rank as commercial services, but for these contracts, and would have to be paid for at public rates; but by virtue of the contract these services become a part of the operation of the utility itself, and hence the proviso excuses a money consideration.

The reason of the proviso is apparent. It is a

restriction upon the courts and the commission, intended to prevent services (which but for these contracts would be commercial service), from being construed as within the rule requiring a money consideration.

The contention that the proviso gives unbridled rein to railroads and telegraphs to contract away their commercial services without charge is not within the reason or logic of the circumstances. The meaning of the phrase "exchange of services" must be sought in light of the circumstances, facts and history of the legislation. In view of all the circumstances, we conclude that "exchange of services" means "operating services" as distinguished from "commercial services."

That this construction is the true one becomes apparent when we observe what would be the condition of the telegraph company and railroad company having no operating agreements with each other; they are at once discriminated against, if their competitor may have the free use of a railroad or a telegraph as the case may be.

The construction here contended for—that Congress meant "operating services" rather than all kinds of services—best comports with the spirit of our times. An equal share of the common burden and an equal opportunity in life is the modern trend of things and the policy of our legislation. To construe the proviso as an enlargement upon the act would be to fly in the face of the spirit of the law and all legal intendment.

There is a further viewpoint. The record shows

that the Great Western gets about $8,000 worth of free telegraphic service a year over and above what it would get for hauling men and material for the Postal Company. This cost of handling this service is born by the patrons or that part of the public which supports the Postal Company, to the profit of the patrons of the Great Western Railroad. This is clearly against the spirit of the law. Those utilities under the act are protected in their just rates and they do not have to drive hard bargains with other utilities in order to live. Regardless of the loss of their free service under these contracts, Congress has given them the basis of a clean, independent business life free from favor to others or the necessity of favors from others. Clearly Congress woud not put them in this favored position and yet permit them to maneuver from this safe base of operations and exact privilege and give preference to the detriment of the public. Being put by Congress in a position where all must pay them their just charges, it is only common justice that railroads and telegraphs should also pay their own way.

Under the present government operation of both railroads and telegraphs where the receipts from both sources and also expenditures are controlled by the government, the time is opportune to settle this matter in accordance with the spirit of the act and wipe out discriminations at this time when it may be done without inconvenience to the public or loss to either railroads or telegraphs during the process of readjustment of relations.

THE SPIRIT OF THE ACT.

There has never been a time in legal history when the letter of a law has been given force over the spirit of the Act. The books abound with apt examples. The presumption is that the lawmaking body never intends to make an unnecessary change in the law. The intention of the legislators when manifest on the face of the statute, or when clearly ascertained by its setting in the circumstances and legal history, is the law, although it may not be consistent with the exact import of the language used.

An illustrative case is found in Rector, etc., of *Holy Trinity Church* v. *United States*, 143 U. S. 457, which involved the construction the "Alien Contract Labor Law," which prohibits the importation into this country of any foreigner under contract to perform "labor or service of any kind." It appeared in that case that a clergyman, an alien residing in England, came to this country under contract to enter the service of a church as its rector. The case was made on an action to recover the penalty provided by the Act. This court said:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and was pressed upon the attention of the legislative body. * * * It is the duty of the courts, under those circumstances to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

That the abolition of discrimination in rates of common carriers is the purpose and spirit of the Act in question admits of no debate.

On July 15, 1915, the Interstate Commerce Commission made a report on the subject which is of much interest in determining the purpose of this commerce legislation and as showing how evasions of the act on the part of railroads cost the traveling public and shippers millions of dollars a year. This report is in part as follows (Tr. 72, *Postal* v. *C. G. W. R. R.*):

> "The practice of granting free transportation of passengers and private cars, although less general than formerly, *in part because of prohibitory legislation upon that subject*, is still a heavy burden upon the railway passenger service, and it is recommended that the practice be still further restricted by carriers. It appears from the commission's compilation of the answers to the questions addressed by it to the carriers that there were issued during the eleven months ending November 30, 1913, by 78 of the roads in official classification territory 629,668 annual passes and 408,848 passes for shorter terms, including passes granted to railroad officials and employees; and in the single month of June 1913, there were issued passes for single trips to the number of 482,709. These trip passes represented 88,575,298 passenger miles.
>
> June is perhaps not a representative month, but at that rate the number of trip passes issued in the year would be approximately 5,792,500, representing over one billion passenger miles.
>
> The amount of travel on annual and term passes has not been determined. At the average rate of fare per passenger mile in official classification territory in 1913 the passenger miles represented by trip passes alone would have yielded in passenger revenue $18,520,000.

"Some of these passes were no doubt issued to employees traveling on business for the carriers, and, of course, it is not assumed that the same amount of travel would have been performed by other passengers if fares had been collected; but even a fraction of this travel would have yielded the carriers a most substantial sum in revenue if paid for at tariff rates. If to trip passes is added the travel on annual and term passes it will perhaps be found that the travel on passes exceeds 10 per cent of the total passenger travel in official classification territory.

"Compilations prepared by the Commission show that the revenue from private cars handled free during the year 1913 on eighty-eight of the roads which have made answer to our question would, at tariff rates, have amounted to $644,250.79.

"But the direct cost and revenue loss attendant upon the present practice are less serious than is its demoralizing effect. It is natural that subordinates should be wasteful when their superiors are extravagant; and that efforts to secure economies should often prove futile when, at the expense of stockholders or the public, the luxury of a private car is freely granted for personal and private use to officers and directors or even to subordinate officials and members of their families. The record of one of the railroads most prominent in the appeal for a freight rate advance discloses such liberal grant of free transportation of private cars, not only to directors and officers of other independent railroads, but to lesser officials of such carriers and to members of their families. Among the beneficiaries were the wives of first, second and third vice-presidents, the wife of a superintendent, the wife of a superintendent of telegraph, the mother of a chairman, the secretary of the vice-president of a telegraph company, and the chief clerk to a president. Indeed,

> not a private car merely, but two special trains were furnished free to the widow of a former director, the tariff rate for which service would have been $3,466. The wife and daughter of the president of that company enjoyed in a single year free transportation in private cars for nine trips on which the tariff rates would have aggregated $3,577." (Tr. *Postal Tel.-C. Co.* v. *Tonopah, Etc.*, R. R. 123.)

This is the evil sought to be removed by the Commerce Act, and when telegraphs are allowed to give free telegraphing to railroads, the patrons of the telegraphs are being made to help bear the expense of those who travel.

In the case of *Express Companies* v. *United States*, 212 U. S. 522, which arose under the Hepburn Amendment to the Interstate Commerce Act, it was sought to extend the privilege of permitting express companies to give free transportation of packages to its employees on the theory that such had long been the custom and was presumably known to Congress. The contention was that inasmuch as express companies were common carriers they were entitled to the same privileges as the law gave to railroads under the proviso permitting free franks and passes. As originally reported the Bill did not apply to express companies, but contained the proviso. Later the Bill was amended to include express companies, and the proviso remained unchanged and escaped notice. The court ruled that although express companies were within the term "carriers" they were not within the meaning or spirit of the act. Quoting from a prior case the court said:

> "The all embracing prohibition against either

directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

In the case of *Santa Fe Railway* v. *Grant Bros.*, 228 U. S. 177, it appeared that the railroad had made a contract with Grant Bros. to do some construction work and, in consideration of a reduced rate for carriage of the men and materials, all risk of loss or damage was to be borne by the contractor. It was contended that railroads could not thus limit their liability. The court held that the facts took the case out of the rule which prohibits a common carrier from contracting away its liability as a carrier. The court said:

"Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation. * * *

"It is clear that in dealing with transportation of this character over its own road, in con-

> nection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith, and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. See *Re Railroad-Telegraph Cos.*, 12 Inters. Com. Rep. 10, 11."

The Santa Fe case above referred to has a peculiar application to the case at bar in that it presents a state of facts falling clearly within the legislative intention when the proviso in question was adopted. The spirit of the 1910 amendment was to enable railroads and telegraph companies to enjoy contracts for joint operation in which each would be rendering the other a service which, but for the contract, it would have to do for itself or pay for at the current price. The sound business sense view taken by the Interstate Commerce Commission in its ruling upon railroad-telegraph contracts was apparently noted by this court as it cites with approval the administrative ruling of the commission which is here involved, a fact not without interest in this case. (228 U. S. 188; citing 12 I. C. C. Rep. 10, 11.)

In light of all the circumstances under which the original act and its several amendments were passed, it seems clear that Congress did not intend that railroads and telegraph companies should revert to the very practices against which it had turned its face for a quarter of a century. Courts have never permitted the purposes of laws to be defeated by the

ues of inadvertent expressions, ambiguous terms or unfortunate language where the manifest intention is stamped upon the record.

THERE IS NO HARDSHIP IN ENFORCING THE RULING.

There will arise no hardship to either the railroads or telegraph companies, if the ruling of the commission and the spirit of the Act are upheld. The Western Union contract with the B. & O. provides for free service to the extent of Ten Thousand Dollars ($10,000) shall be accorded each to the other in commercial business, that is off-line service, and half rate over that figure. The contract provides that the Western Union shall issue:

> "Annual franks authorizing the free transmission of messages * * * beyond or off the line of said railroads to an amount not exceeding $10,000.00 per annum calculated at the regular commercial day rates, * * * and the railroad agrees to pay to the telegraph company one-half of its aforesaid rates on all such messages in excess of said amounts, settlements to be made yearly."

The same contract also provides that the B. & O. agrees to transport men and materials not within the joint operation of the two utilities, but in the general business of the Western Union off the line of the B. & O.

> "to an amount not exceeding $10,000.00 per annum calculated at the current transportation rates of the railroad company; and the telegraph company agrees to pay to the railroad company one-half of its aforesaid rates on all such transportation of employees and poles and other material in excess of said amount. Settlements to be made yearly."

With apprehensive foresight the Western Union and B. & O. in paragraph fourteen of their contract stipulated a release of damages each to the other in case any part of their contract should be held invalid for want of legal authority to so contract.

All that is lacking in this contract to make it comply with the spirit of the Interstate Commerce Act is a further provision to the effect that when the yearly settlements are made they shall strike a balance between the amounts of service actually used and the company using the most service pay the other the excess. In other words each pay for the service actually given it by the other.

The free service accorded by their contract is the difference in the amount of *commercial* railroad or telegraph service used. The one using the most service gets the excess free of charge up to $10,000 and half rates for the excess.

The Great Western-Postal contract provides that the Postal Company shall:

> "Transmit free over its lines beyond said railroad telegraph lines, business of the railroad company to the extent of $10.00 per mile of railway per annum, * * * and in case the telegraph business of the railroad company beyond its lines shall amount to more than $10.00 per mile per annum, the excess shall be paid for at one-half the regular rates of the telegraph company."

The corresponding part of the contract obligating the railroad company to give free service is that it agrees to transport:

> "Free of charge over its railway * * * employees of the telegraph company when traveling upon the business of said company."

The provision in the Great Western contract for the transportation by the railroad company of material covers only that material to be distributed along the line, for use in upkeep, etc., of the joint operating equipment.

The Tonopah-Postal contract provides that the Postal shall pay cash for the transportation of its off the line or commercial business in the way of men or material handled by the railroad. But the contract provides that the Postal Company shall transmit without charge commercial or off the line business of the railroad company to the extent of $12 per mile per annum for the first 200 miles of railroad and $10 per annum for each mile over 200, computed at regular day telegraph rates. All telegraphic services over that amount the railroad company pays for at full day rates.

In the Tonopah contract there is no free commercial service to be given by the railroad company of any kind. This contract was drawn in accordance with the ruling of the Interstate Commerce Commission in 1906 (Tr. 34) and is so balanced up that the railroad company cannot lose, that is it does not give free service. At the time this contract was drawn the Postal Company was not under the Interstate Commerce Act and was privileged, so far as that act was concerned, to bargain away its commercial business without a money consideration.

Looking generally over these contracts, the idea clearly presents itself that the commercial business done for each other by these utilities was not an "exchange of services." It was a sale. The price is definitely fixed on all of it. Records are required to

be kept and the balance to be struck is computable in terms of money. The transaction is a sale so far as it goes. Beyond that it is free.

The idea of an exchange is the giving of one thing for another. But to give so much grain at $1 per bushel for so many cattle at $100 per head is strictly speaking a sale. (Webster's Dictionary.) These contracts are, therefore, not within the meaning of the phrase "exchange of services" as used in the Act.

But to sustain the ruling of the commission will not harm either utility. They will be but placed upon equal terms. They may proceed to exchange their operating services (*without keeping any track or account of the amount*) and mutually help each other in their joint undertaking and may readjust their operating conditions to their mutual satisfaction. If anything be lost to either, it will be merely the elimination of a preference over the public. But their loss is the public's gain. And that is the spirit of the law.

THE POST ROADS ACT.

An interesting phase of this question arises in view of the fact that the Telegraph Companies have accepted the Post Roads Act of Congress, passed July 24, 1866. Under this act the government may purchase all the telegraph lines, property and effects so used at an appraised value, to be used for postal, military and other purposes. Under this Act it was held by this court that the Union Pacific Railway could not grant the Western Union Telegraph Company an exclusive right to the use of its right of way which was a post road (160 U. S. 41). If the con-

tracts here in question be held legal, then should the government take over the telegraph lines under the Post Roads Act, it will have to assume the burden of all the free service allowed the railroads under the contracts. Congress surely had no such intention when it included the proviso in question in the Act.

There is an argument contained in the bill filed in the B. & O.-Western Union case, which we will answer here. That argument is that the considerations of railroad contracts are so exactly balanced, interwoven and mutual that the enforcement of the ruling of the Interstate Commerce Commission will thereby destroy and annul such contracts in their entirety and deprive the public as well as the parties of all of the benefits derived therefrom, in the matter of the use and operation of the railroads and in the use of the widespread facilities owned by the telegraph company. This argument is a specious one and gains plausibility only by virtue of the fact that the pleader overlooks entirely the fact that the commercial services which are contracted to be exchanged are measurable in terms of money and are so measured in the contracts. No disorganization of business of either the telegraph company or the railroad company will result, nor will any inconvenience to the companies or to the public whatever result from the enforcement of the rule. The only additional thing required by the rule is that at the end of the year a balance shall be struck between the contracting companies and the balance thereby determined be paid by one to the other.

This is exactly what happened when in 1906 the Interstate Commerce Commission forbade the rail-

roads giving free railroad service to the telegraph companies in accordance with existing contracts, except so far as such railroad service pertained to telegraph men and material used on that particular railroad. The railroads promptly cut off all other free service of the telegraph companies, and disregarded the existing contracts in that respect, and yet nothing happened, and neither party claimed that the entire contracts were void. The remaining portions of the contracts were carried out and there is no reason to believe that there would be any different result if that same rule were now applied to these contracts as to this free service on both sides.

The further argument of the Western Union and Baltimore & Ohio that to uphold this ruling of the Interstate Commerce Commission would deprive the public of the telegraph service at railroad stations is absurd. Nothing of the sort would happen. The railroad would continue to give telegraph service in those depots, and, in fact, would be very glad to do it because the railroad would then keep the telegraph tolls on telegrams between points on the railroad, and a portion of the tolls to outside points, whereas at present the telegraph companies under the usual railroad-telegraph contract get all of such tolls. The testimony of Mr. Baker on this subject is convincing. (Tr. 76.) As to the Western Union and Postal companies being deprived of those tolls, they can well afford to let them go to offset the immense amount of free telegraph service now being given by the telegraph companies to the railroad companies throughout the United States.

For the several reasons shown above the ruling of the Interstate Commerce Commission should be sustained and the decree of the Court of Appeals reversed.

Dated January 6, 1919.

Respectfully submitted,

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